No. 17-7505

In the Supreme Court of the United States

VERNON MADISON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ of Certiorari to the the Mobile County Circuit Court

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED
(Capital Case)

Although the Court granted certiorari on these two questions, Madison's brief changes the first question presented. The following are the questions on which the Court granted certiorari, not the questions as rephrased in Madison's brief.

(1) Consistent with the Eighth Amendment, and this Court's decisions in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), may the State execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense?

(2) Do evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 3

A. Trial and post-conviction proceedings. 3

B. The first state court competency petition 5

C. The court of appeals grants habeas corpus, and this Court summarily reverses. 10

D. Madison's second state court competency petition. 12

SUMMARY OF ARGUMENT 13

ARGUMENT 17

I. The lower court's decision is consistent with *Ford* and *Panetti*. 17

A. Madison can rationally understand his punishment. 18

B. Madison's arguments for reversal are unpersuasive. 22

II. The Eighth Amendment allows a State to punish a murderer whose mental disability leaves him without memory of his commission of the capital offense. 27

A. The common law supports the punishment of murderers who cannot remember committing a crime. 28

B. Madison's position finds no support in state legislation or sentencing practice. 32

C. The State has valid penological interests in punishing a murderer who cannot remember committing a crime. 34

III. Madison's proposed extension of *Ford* and *Panetti* will lead to false claims, manipulation, and abuse. 41

CONCLUSION 47

TABLE OF AUTHORITIES

Cases

Addington v. Texas, 441 U.S. 418 (1979) 42

Ake v. Oklahoma, 470 U.S. 68 (1985) 41

Atkins v. Virginia, 536 U.S. 304 (2002) ..... passim

Baird v. Davis, 388 F.3d 1110 (7th Cir. 2004) 34

Bedford v. Bobby, 645 F.3d 372 (6th Cir. 2011) 21

Clark v. Arizona, 548 U.S. 735 (2006) 26

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Graham v. Florida, 560 U.S. 48 (2010) 35

Gregg v. Georgia, 428 U.S. 153 (1976) 17, 32, 39

Hall v. Brannan, 670 S.E.2d 87 (Ga. 2008) 34

Harris v. Alabama, 513 U.S. 504 (1995) 4

In re Neville, 440 F.3d 220 (5th Cir. 2006) 34

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Kennedy v. Louisiana, 554 U.S. 407 (2008) 35

Madison v. Allen, 2011 WL 1004885 (S.D. Ala. Mar. 21, 2011) 5

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Madison v. Comm'r, Alabama Dep't of Corr., 851 F.3d 1173 (11th Cir. 2017) 11

Madison v. Dunn, 2016 WL 2732193 (S.D. Ala. May 10, 2016) 10, 24

Madison v. State, 545 So.2d 94 (Ala. Crim. App.1987) 3

Madison v. State, 620 So. 2d 62 (Ala. Crim. App. 1992) 3, 4

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Penry v. Lynaugh, 492 U.S. 302 (1989) 32

Price v. Thurmer, 637 F.3d 831 (7th Cir. 2011) 45

R. v. Podola, [1959] 43 Crim. App. 220 29

Roberts v. Louisiana, 431 U.S. 633 (1977) ..... passim

Roper v. Simmons, 543 U.S. 551 (2005) 27, 33, 40

Russell v. H.M. Advocate, 1946 S.C.(J.) 37.....29

Simon v. Fisher, 641 F. App'x 386 (5th Cir. 2016).....21

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Solesbee v. Balkcom, 339 U.S. 9 (1950).....41

State ex rel. Clayton v. Griffith, 457 S.W.3d 735 (Mo. 2015).....21

State v. Irick, 320 S.W.3d 284 (Tenn. 2010).....22, 34

State v. Johnson, 207 S.W.3d 24 (Mo. 2006).....34

State v. Ketterer, 855 N.E.2d 48 (Ohio 2006).....34

Tison v. Arizona, 481 U.S. 137 (1987) 35

Trop v. Dulles, 356 U.S. 86 (1958).....27

Statutes

28 U.S.C. § 2254 10

Ala. Code § 13A–5–40 3

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INTRODUCTION

This case is about the State's sovereign power to impose a just and constitutional punishment on a violent criminal who murdered one of the State's own law enforcement officers. From the State's perspective, the question is not just whether Madison may be punished for violating the State's criminal laws. It is whether the State can "assure that there will be a police force to see that the criminal laws are enforced at all." *Roberts v. Louisiana*, 431 U.S. 633, 647 (1977) (Rehnquist, J., dissenting).

For his part, Madison clearly intends to "claim that he has become insane" no matter "the number of prior adjudications of the issue, until the very moment of execution." *Ford v. Wainwright*, 477 U.S. 399, 429 (1986) (O'Connor, J., concurring in part and dissenting in part). Madison first claimed that he could not remember murdering Officer Schulte in 1990, long before he purportedly suffered from dementia-related amnesia. On the eve of his scheduled execution in 2016, he asserted incompetence for the same memory failure but blamed it on two recent strokes. After the Court rejected his position last year, *see Dunn v. Madison*, 138 S. Ct. 9 (2017), Madison filed a new petition in the same state court under the same case number to make the same allegations based on the same evidence.

The Court granted certiorari again to address the question Justice Ginsburg noted last year: "whether a State may administer the death penalty to a person whose disability leaves him without memory of his commission of a capital offense." *Id.* at 12 (Ginsburg, J., concurring). But Madison's brief expressly changes the question presented from the one he posed in his certiorari petition. *Compare* Cert. Pet. at i *with*

Pet. Br. at i. And that brief proposes no cogent theory for why the Constitution would bar the execution of a prisoner "without memory" of his capital offense.

Despite Madison's arguments to the contrary, the trial court did not hold that dementia-related infirmities can never render a person incompetent to be executed. Instead, the trial court held that *Madison's* dementia does not render *him* incompetent to be executed. As we explained the last time we came before this Court, Madison understands that he is being punished for a murder he committed and for which he has never accepted responsibility. He is "neither delusional [n]or psychotic." Doc. 8-1 at 111.[1] Madison's own expert confirmed that he "is able to understand the nature of the pending proceeding," Doc. 8-3 at 19, understands that "the reason he was in prison was because of 'murder,'" understands that the State is "seeking retribution" for that crime, Doc. 8-3 at 18, and "understands the sentence . . . specifically the meaning of a death sentence," Doc. 8-3 at 18. Although some other dementia patient could be incompetent, the state court was well within reason to hold that Madison is not.

Like he did in 1990, Madison asserts that he cannot remember murdering Officer Julius Schulte. But Madison's ability to recall the killing has no bearing on the State's interest in punishing him for it. The community remembers Officer Schulte. His family remembers. The eyewitnesses who saw the murder—they remember. Although Madison may not recall committing this crime, the Eighth Amendment does not bar the State from punishing him for it.

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[1] Our citations to the record follow the format established in Madison's brief. *See* Pet. Br. at 5 n. 2.

STATEMENT

In April 1985, Vernon Madison killed Officer Julius Schulte during a domestic dispute. At the request of Madison's neighbors, Officer Schulte was protecting Madison's ex-girlfriend and her 11-year-old daughter while Madison moved out of their house. After pretending to leave, Madison retrieved a pistol, crept behind the car where Schulte was sitting, and fired two shots into the back of Schulte's head. *Madison v. State*, 620 So. 2d 62, 64 (Ala. Crim. App. 1992). After shooting Officer Schulte, Madison shot his ex-girlfriend in the back as she tried to run away. *Id.* Three eye witnesses—including the 11-year-old girl—watched as Madison murdered Officer Schulte and tried to murder his girlfriend. *Id.*

A. Trial and post-conviction proceedings.

Madison was charged with capital murder because he had murdered an on-duty police officer. *See* Ala. Code § 13A–5–40(a)(5). The government has "a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property." *Roberts v. Louisiana*, 431 U.S. 633, 636 (1977). Because of procedural errors, Madison was tried and convicted three times. *See Madison v. State*, 545 So.2d 94, 99 (Ala. Crim. App.1987); *Madison v. State*, 620 So.2d 62, 63 (Ala. Crim. App. 1992); *Madison v. State*, 718 So.2d 90 (Ala. Crim. App. 1997).

Although there has never been any doubt about Madison's guilt, he never accepted responsibility for murdering Officer Schulte. Instead, he has always concocted various theories to excuse his crime. For example, before his second trial in 1990, Madison was already telling psychologists that "he could not

remember the shooting." *Madison*, 620 So. 2d at 66. By the time of his third trial, he was claiming self-defense. *Madison*, 718 So. 2d at 97.

After each trial, Madison was sentenced to death because of his lifetime of violent crime.[2] Madison had previously been convicted of robbery, assault and battery with intent to kill, aggravated assault, and other violent offenses. *See* Sentencing Order at 4-5, *State v. Madison*, CC85-1385.80 (Mobile Cty. Cir. Ct. July 7, 1994). He was on parole from his most recent conviction when he murdered Officer Schulte. *Id.* at 5. After his third conviction and sentence were affirmed on direct review, Madison spent twenty years pursuing every conceivable avenue of state and federal post-conviction relief.

Madison's state post-conviction petition "languished in the [state] court for years with little action." *Madison v. State*, 999 So. 2d 561, 567 (Ala. Crim. App. 2006). "An evidentiary hearing was scheduled for February 23, 2000, but was continued on Madison's motion." *Id.* One year later, "[t]he circuit court issued an order notifying Madison that the [post-conviction] petition would be dismissed if counsel did not contact the court within 30 days." *Id.* Madison requested that a hearing be delayed for at least a year. *Id.* When that time came, he replaced his counsel. *Id.* Eventually, the trial court "concluded

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[2] Madison's first two juries recommended a death sentence. *See Madison*, 545 So. 2d at 95 (the jury's vote was 11-1); *Madison*, 620 So. 2d at 63 (10-2). The third death sentence was imposed by a judge after this Court had affirmed the constitutionality of judicial sentencing in capital cases. *See Harris v. Alabama*, 513 U.S. 504 (1995) . Madison waived any objection to the judge's sentencing authority. *See Madison*, 718 So. 2d at 104.

the long-delayed postconviction proceedings" by granting the State's motion to dismiss. *Id.*

Madison filed his first federal habeas petition in 2009. *Madison v. Allen*, 2011 WL 1004885, at *1 (S.D. Ala. Mar. 21, 2011). The federal habeas court held an evidentiary hearing on Madison's claim that the prosecutor exercised six of his eighteen strikes against black jurors because of their race. The court noted that Madison's final "jury was seven (7) blacks and seven (7) whites," even though the jury pool was 75% white. *Madison v. Allen*, 2013 WL 1776073, at *6 (S.D. Ala. Apr. 25, 2013). The prosecutor who tried Madison eventually became the "Chief of the criminal division for the U.S. Attorney's Office in the Southern District of Alabama." *Id.* Based on contemporaneous notes, he testified that he struck these six jurors for specific race-neutral reasons. *Id.* The federal habeas court denied the petition, and this Court denied certiorari. *See Madison v. Thomas*, 135 S. Ct. 1562 (2015).

B. The first state court competency petition

After the Attorney General asked the Supreme Court of Alabama to set an execution date, Madison filed a successive state-court post-conviction petition claiming he was incompetent to be executed. Doc. 8-1. The petition asserted that Madison was incompetent because he had suffered "both short-term and long-term memory loss." Doc. 8-1 at 2.

The state court set a hearing to evaluate Madison's claims of incompetence and gave Madison the opportunity to submit evidence, including from his own psychological expert. Doc. 8-1 at 55. Before the hearing, Madison was evaluated by Dr. Karl Kirkland, a court-appointed psychologist, and Dr. John

Goff, a neuropsychologist retained by Madison. At the hearing, the state court admitted Dr. Kirkland's report, Dr. Goff's report, and Madison's medical records. The state court also heard testimony from Dr. Kirkland, Dr. Goff, and the warden of the prison where Madison lived.

1. Dr. Kirkland's testimony. The state court appointed Dr. Kirkland to examine Madison's claims as a neutral expert on behalf of the court. Dr. Kirkland concluded that Madison has had physical and cognitive decline as a result of strokes. Doc. 8-1 at 74 (hearing). Even so, Dr. Kirkland concluded that Madison has a rational understanding that he is to be executed for killing a police officer in 1985. Doc. 8-1 at 78-79 (hearing); Doc. 8-3 at 9-10 (expert report). Dr. Kirkland determined that Madison has a "rational understanding of the sentence, [and] the results or effects of the sentence . . . ." Doc. 8-3 at 10 (report). Dr. Kirkland also found that Madison had normal thought content and showed no symptoms of psychosis, paranoia, or delusion. Doc. 8-3 at 8 (report).

Dr. Kirkland learned from Madison's treating physicians that Madison did not suffer from psychosis or delusions. Doc. 8-1 at 77 (hearing). They also reported that Madison was asked for, and able to give, consent for medical procedures. *Id.* at 76. Madison "refuses some of his medications because of side effects" but his treating physicians "felt that he knew what he was doing" in making that choice. *Id.* at 78.

At his evaluation, Madison gave Dr. Kirkland a detailed history of his life, his criminal record, and his conviction for murder. For instance, Madison said he was the son of Willie Seale and Aldonnia Madison, was "born in an old Mobile Hospital for African Americans that no longer exists," and that he is the

"oldest of 11 children, seven boys and four girls," four of whom have died. Doc. 8-3 at 3-4 (expert report). Madison said he was raised "on the end of Old Stanton Road in Mobile, where Stanton Street runs into Stanton Road." *Id.* at 4. Madison remembers his multiple juvenile arrests and the details of these crimes, including shooting a man in Mississippi, and the time he escaped from the Mt. Meigs Department of Youth Services Camp, hitching "rides all the way back home." *Id.* at 3. Madison remembered trying to join the Army during the Vietnam War because he "knew they would draft him one way or the other," and he remembers being "excluded from the Army by the physical due to be[ing] rated 4F." *Id.* at 4.

Madison also remembered details of his multiple trials, convictions, and appeals. Madison discussed each appeal and "marveled each time with the fact that the whole process would end up being back in Judge McCray's court." *Id.* at 8. Dr. Kirkland testified that "[Madison] was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense even, as well as each trial." Doc. 8-1 at 123 (hearing).

Dr. Kirkland determined that although Madison had physical and mental limitations, Madison "clearly was able to discuss his case in a very accurate manner, including being able to accurately tell this examiner legal theories about why Judge McCray should have recused himself and why he refused to do so." Doc. 8-3 at 9 (expert report). When asked if Madison had a rational understanding of the reason for his execution, Kirkland replied, "Certainly. He talked specifically about death sentence versus life

without in the original trial and the first retrial and in the second." Doc. 8-1 at 124 (hearing).

2. Dr. Goff's testimony. Madison's expert, Dr. Goff, agreed with Dr. Kirkland that Madison experienced cognitive decline after suffering a stroke. He also diagnosed Madison with dementia or major neurological disorder. Even so, Dr. Goff concluded that Madison understands "the meaning of a death sentence." Doc 8-3 at 18 (expert report). Dr. Goff also concluded that Madison said his crime "must have been a murder," that he had three trials, and that he felt his "conviction was unjust." Doc. 8-3 at 18 (expert report). Dr. Goff concluded that Madison "is able to understand the nature of the pending proceeding and he has an understanding of what he was tried for." Doc. 8-3 at 19 (expert report). Similarly, Dr. Goff testified that Madison was not delusional or psychotic. Doc. 8-1 at 111 (testimony of Dr. Goff).

But, based on his interview with Madison, Dr. Goff opined that Madison had no independent recollection of the murder. According to Dr. Goff, Madison could not remember the name of the victim, and he did not think he killed anyone because he purportedly "never went around killing folks." Doc. 8-3 at 18 (report). Because Madison purportedly could not remember the murder, Dr. Goff concluded that Madison did not understand the rationale of the current proceeding as it applied to him. Doc. 8-3 at 19-20. Dr. Goff remarked, "I think he understands that he's being executed, but I don't think that he understands why, because I don't think he has those--those memories." Doc. 8-1 at 110 (hearing). Similarly, Dr. Goff concluded that "I think he understands that [the State is] seeking retribution" but "I don't think he understands the act that he's being -- that he's being

punished for." *Id.* at 120. When Dr. Goff formed that conclusion, he was unaware that Madison had always denied responsibility for the murder. *Id.* at 120.

Dr. Goff gave three reasons for believing that Madison cannot remember killing Officer Schulte. First, Dr. Goff concluded that Madison had experienced a thalamic stroke. Doc. 8-3 at 19 (expert report). Second, Dr. Goff relied on Madison's statements that he does not recall the murder and that he "never went around killing folks." *Id.* at 18 (report); Doc. 8-1 at 115-16 (hearing). Third, Dr. Goff relied on his evaluation of Madison, including a test he administered showing Madison's trouble completing basic tasks and remembering basic information and Madison's tendency to speak in a rambling vague manner, which suggested to Dr. Goff that Madison "can't remember what it is that he's told me." Doc. 8-3 at 18 (expert report); Doc. 8-1 at 114 (hearing).

3. The Warden's testimony. The warden testified that when Madison received the death warrant setting his execution date, Madison expressed no confusion or lack of understanding of what it meant, commenting, "[M]y lawyers are supposed to be handling that." Doc. 8-1 at 130 (hearing). The warden also testified that Madison was not receiving treatment for a mental condition in prison. Doc. 8-1 at 131 (hearing).

4. The state court's first decision. The state court issued a detailed order, finding Madison competent to be executed. Doc. 8-2 at 149. The state court expressly found that Madison is not delusional. Doc. 8-2 at 158. The state court also found that "Madison has a rational[] understanding, as required by *Panetti*, that he is going to be executed because of the murder he committed and a rational[] understanding

that the State is seeking retribution and that he will die when he is executed. . . . ." Doc. 8-2 at 158.

Alabama law provides no right to appeal this determination in the state court system. *See* Ala. Code § 15-16-23. This is presumably because of the expedited nature of last-minute litigation about executions and because the Supreme Court of Alabama is the body that sets an execution date in the first place.

C. The court of appeals grants habeas corpus, and this Court summarily reverses.

Madison filed a habeas petition in federal court, raising the same claims he raised in the state court proceeding. *See* Doc. 1. Under the Anti-Terrorism and Effective Death Penalty Act, a habeas petitioner cannot obtain relief without showing that a state court's adjudication is "contrary to, or an unreasonable application of, clearly established law," or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The district court denied Madison's application after concluding that "[i]t is apparent that the state court adjudication of these claims applied the relevant *Panetti/Ford* standard for determining competency to be executed, considered all of Madison's factual averments, and found that any dementia, and the alleged deficits in memory associated with that condition, did not prevent Madison from having a rational understanding of his execution and the reasons for his execution." *Madison v. Dunn*, 2016 WL 2732193, at *9 (S.D. Ala. May 10, 2016).

The court of appeals reversed the district court and granted Madison's petition for writ of habeas

corpus. *Madison v. Comm'r, Alabama Dep't of Corr.*, 851 F.3d 1173 (11th Cir. 2017). That court explained that the "mental conditions relevant here" are "dementia and related memory loss," not psychosis or delusions. The court adopted a bright-line rule that "a man with no memory of what he did wrong" cannot be "put to death." *Id.* at 1188. The court held that a person cannot be executed if he "doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." *Id.* at 1189.

This Court summarily reversed the court of appeals. *See Dunn v. Madison*, 138 S. Ct. 9 (2017). The Court held that "the state court did not unreasonably apply *Panetti* and *Ford* when it determined that Madison is competent to be executed because—notwithstanding his memory loss—he recognizes that he will be put to death as punishment for the murder he was found to have committed." *Id.* at 12. The Court recognized that "[t]estimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime." *Id.* The Court explained that "[n]either *Panetti* nor *Ford* 'clearly established' that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." *Id.* at 11-12.

Justice Ginsburg concurred. She noted that "[t]he issue whether a State may administer the death penalty to a person whose disability leaves him without memory of his commission of a capital offense is

a substantial question not yet addressed by the Court." *Id.* at 12 (Ginsburg, J., concurring).

D. Madison's second state court competency petition.

After the State again set Madison's execution date, Madison filed a second petition challenging his competency to be executed. It was filed under the same case number and assigned to the same judge as his first petition. Madison's petition relied on the "previously established evidence of Mr. Madison's significant mental impairments" and asserted unspecified "continued decline." The petition also asserted that the court should discard its neutral expert's previous testimony because he was accused of self-prescribing medications.

The State responded with three main arguments. First, the State asserted collateral estoppel and res judicata, noting that Madison was merely seeking to relitigate decided issues. Second, the State noted that Madison had alleged no new evidence to warrant relitigating his competency—such as a new diagnosis or new expert opinion. Third, the State explained that the neutral expert's legal problems were irrelevant because they had nothing to do with his methodology or conclusions and his testimony matched the testimony of Madison's own expert.

The court held oral argument limited to whether the court should vary from its previous order denying Madison's competency petition. The judge recalled from the prior hearing that there was "nothing in [Dr. Kirkland's] demeanor, his testimony, his approach to how he evaluated the case to be []significantly different from Dr. Goff's" and "[t]hey pretty much came down the same except for a very few

matters." Hr'g R. at 29:6-12. After the hearing, the court orally denied Madison's petition from the bench. Hr'g R. at 32:23-25; 33:1. The court later entered a written order denying Madison's second petition because it "did not provide a substantial threshold showing of insanity . . . sufficient to convince this Court to stay the execution." Cert. Pet. App. A.

SUMMARY OF ARGUMENT

The Eighth Amendment does not prohibit the State from executing a convicted murderer because he cannot independently recall committing a crime. The death penalty is justified by the State's interests in retribution and deterrence, and those interests are not diminished when a convicted murderer cannot remember committing his crime.

I. The lower court correctly applied this Court's Eighth Amendment precedents to deny Madison's competency claim.

A. Although the Eighth Amendment prohibits the State from executing someone who is insane and lacks a rational understanding of the reasons for his execution, the lower court correctly held that Madison does not meet that standard. Madison's mental disorder does not render him incompetent. Although his dementia purportedly precludes him from remembering his capital offense, it does not preclude him from understanding that he is being punished for murdering Officer Schulte or from sharing the community's understanding of crime, punishment, retribution, and death.

Under this Court's precedents, a State may execute a prisoner whose mental disability leaves him

without memory of his commission of the capital offense. A failure to recall committing a crime is distinct from a failure to understand why one is being punished for a crime. An inmate's personal recollection of the crime is irrelevant to whether the inmate shares the community's understanding of the crime, has a moral responsibility for committing the crime, or understands why he is being punished for the crime.

B. Madison incorrectly argues that the lower court misapplied this Court's precedents. Although Madison suggests that the mere diagnosis of dementia means that he is incompetent to be executed, this Court has made clear that a prisoner's mental condition does not establish incompetence unless that mental condition precludes the inmate from understanding why he is being executed.

Nothing about dementia necessarily precludes a rational understanding of crime and punishment. Cognitive disorders like dementia exist on a spectrum of cognitive and functional impairment and are accompanied by a wide variety of symptoms. Although another prisoner may be rendered incompetent by dementia, the lower court appropriately held that Madison has not been.

II. No part of this Court's Eighth Amendment doctrine suggests that the Constitution eliminates the sovereign power of the State to punish a convicted murderer who cannot remember committing a capital offense.

A. The common law supports the punishment of criminals who do not remember committing a crime. The common law prohibition on executing the insane narrowly applied to prisoners who lacked the

capacity to reason or understand. Common law courts have held that amnesia does not constitute insanity.

Moreover, the rationales offered by common law authorities do not preclude punishing a murderer who lacks an independent recollection of his crime. The loss of memory does not undermine a prisoner's ability to appreciate the religious and moral significance of his crime. Nor does it affect his ability to participate in court proceedings after his guilt has been established.

B. There are no objective indicia that society has determined that it is inhumane to execute an inmate who cannot recall his crime. Despite several recent highly-publicized amnesia claims by death row inmates, no state has enacted legislation to preclude the execution of an inmate who cannot recall committing a crime. Standards promulgated by professional associations likewise suggest that an inmate's recollection is irrelevant to his competency to be executed.

C. Lastly, the State has two penological interests in punishing a murderer who cannot remember committing a crime: retribution and deterrence.

Retribution is concerned with whether a person is culpable for an offense that warrants punishment. The Court has recognized that the murder of a police officer is a grievous offense that warrants the harshest punishment. And, unlike the young or intellectually disabled, Madison is fully culpable for murdering Officer Schulte. Madison's mental condition does not preclude him from understanding that he is being punished for murdering a police officer or that such a murder is a grave moral wrong.

Deterrence also justifies the execution of an inmate, regardless whether he can recall his crime. Madison's execution will serve as an example to others that the intentional murder of a police officer will be punished. And an inmate suffering from amnesia is no less subject to deterrence than an inmate who remembers the crime that put him in prison.

III. Madison's proposed rule would increase the potential for false claims and manipulation.

First, Madison's argument would preclude the execution of any inmate with dementia, giving that diagnosis an unwarranted importance. The diagnosis of cognitive disorders is not straightforward, and the difference between a minor disorder and a major disorder is essentially arbitrary.

Second, Madison's rule would allow many more inmates to assert incompetence claims. Many medical conditions can arguably result in the loss of memory. And few convicted capital murderers are willing to concede the facts of their crime or their moral responsibility for it.

Third, a prisoner's assertion that he cannot remember his crime is not objectively verifiable. Although there are ways to test cognitive decline and memory loss, the only person who can know for sure whether an inmate remembers his crime is the inmate himself.

The Eighth Amendment forbids the execution of a murderer who has lost his sanity, not his memory. This Court should affirm.

ARGUMENT

I. The lower court's decision is consistent with *Ford* and *Panetti*.

The Constitution affirms the sovereign power of the States to execute the worst murderers as a deterrent to themselves and others and as retribution for the community's loss. *See Gregg v. Georgia*, 428 U.S. 153, 176 (1976). This Court has recognized that the imposition of the "death penalty undoubtedly is a significant deterrent" to "many" murders and that retribution "is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Id.* at 183, 185 (joint opinion of Stewart, Powell, and Stevens, JJ.).

Nowhere are these state interests more apparent than where, as here, the State's own agent was the victim of premeditated murder. *See Roberts v. Louisiana*, 431 U.S. 633, 636 (1977). "Policemen are both symbols and outriders of our ordered society, and they literally risk their lives in an effort to preserve it." *Id.* at 647 (Rehnquist, J., dissenting). For that reason, the State has an especially strong interest "in making unmistakably clear that those who are convicted of deliberately killing police officers acting in the line of duty" know that punishment "will be inexorable." *Id.* (Rehnquist, J., dissenting).

In light of these principles, Madison must carry an especially heavy burden to justify an exception to the constitutionality of capital punishment for his unique circumstances. He cannot do so. When he murdered Officer Schulte, Madison was not part of a class with any characteristic tending to make him less culpable or less subject to deterrence. He was

not, for example, intellectually disabled or a juvenile. Instead, he was a thrice-convicted violent felon on parole. Today, Madison is older. But he knows that he is being punished for a crime he committed, and he shares the community's understanding of that crime and the punishment. It is neither cruel nor unusual for the State to carry out his sentence.

A. Madison can rationally understand his punishment.

The lower court correctly determined that Madison's allegations in his second petition did not establish that he was incompetent to be executed. Madison's second petition in the state court merely reasserted the allegations in his first petition, with the addition of unrelated charges against the court's appointed expert. Because of these identical allegations, there was no reason for the lower court to vary from its prior fact-finding that "Madison has a rational[] understanding, as required by *Panetti*, that he is going to be executed because of the murder he committed and a rational[] understanding that the State is seeking retribution and that he will die when he is executed. . . . ." Doc. 8-2 at 158.

This fact-finding is neither clearly erroneous nor a misapplication of this Court's case law. The Eighth Amendment prohibits a state "from inflicting the penalty of death upon a prisoner who is insane," *Ford v. Wainwright*, 477 U.S. 399, 410 (1986), including one who "suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced," *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007). The upshot is that an inmate

may "establish[] incompetency by . . . a showing that his mental illness obstructs a rational understanding of the State's reason for his execution." *Id.* at 956.

But an inmate cannot meet his burden under *Ford* and *Panetti* merely by showing that he has been diagnosed with a mental disorder. Instead, the inmate must show that his diagnosed mental disorder actually prevents him from a factual or rational understanding of the reasons for his execution. *Panetti*, 551 U.S. at 959. *See also Ford*, 477 U.S. at 422 (Powell, J., concurring). The prisoner's "awareness of the crime and punishment" must have "little or no relation to the understanding of those concepts shared by the community as a whole." *Panetti*, 551 U.S. at 959. Accordingly, the inquiry is whether the diagnosed mental disorder "render[s] a subject's perception of reality so distorted that he should be deemed incompetent." *Id.* at 962.

The lower court correctly applied this Court's precedents to the facts of Madison's case. It is undisputed that Madison has suffered cognitive decline over the years. But it is also undisputed that Madison has not experienced delusions, psychosis, or confusion about the meaning of crime, punishment, or death. Moreover, as this Court has already explained, "[t]estimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime." *Dunn*, 138 S. Ct. at 12. Despite Madison's cognitive decline, Madison's own expert, Dr. Goff, "found that Madison 'is able to understand the nature of the pending proceeding and he has an

understanding of what he was tried for'; that he knows he is 'in prison ... because of murder; that he 'understands that ... [Alabama is] seeking retribution' for that crime, and that he 'understands the sentence, specifically the meaning of a death sentence.'" *Id.* at 10-11. Even Madison's responsibility-denying statements that he never "went around killing folks" and that his sentence is "unjust" proves that he understands the crime he committed and the retributive nature of his sentence. Doc. 8-3 at 18 (expert report).

Madison's dementia purportedly means that he does not remember—and will not acknowledge—murdering Officer Schulte. *See* Pet. Br. at 9 ("memory loss"), 10 ("retrograde amnesia"), 11 ("memory impairments"), 25 ("cannot independently recall the facts of the offense"). But the Court has already recognized that an inmate's "failure to remember his commission of the crime" is "distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." *Dunn*, 138 S. Ct. at 12. A history major may have no independent memory of the Vietnam War, but still understand the conflict; a Vietnam veteran may remember the war in vivid detail, but have delusional beliefs about it. "[E]veryone is amnesic to some degree" because "every individual's memory process is marked by some distortion." *Note, Amnesia: A Case Study in the Limits of Particular Justice*, 71 Yale L. J. 109, 109-111 (1961). But such memory problems do not stop us from having a rational understanding of our past. They do not make us less culpable or deserving of punishment. They do not render our punishment any less of a deterrent to ourselves or others.

Panetti itself compels the common-sense conclusion that an inmate's "failure to remember his commission of the crime" is "distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." *Dunn*, 138 S. Ct. at 12. In *Panetti*, the Court made clear that the rational understanding it required was an "awareness of the crime and punishment" like that "shared by the community as a whole." *Panetti*, 551 U.S. at 958-59. But no one in the broader community (except, perhaps, an eyewitness) will understand an inmate's execution based on his or her own independent recollection of the facts of a murder. Rather, the community's understanding will be based on the facts as adduced in the trial, press reports, or other third party accounts. Independent recollection of a crime has nothing to do with the community's understanding of the punishment.

This self-evident distinction between memory and rational understanding is why the lower courts are unanimous in their opinion that a murderer's inability to remember his crime does not render him incompetent to be executed.[3] The only lower court

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[3] *See Bedford v. Bobby*, 645 F.3d 372, 374-76, 378 (6th Cir. 2011) (although inmate's "condition ha[d] ... deteriorated ... with the onset of . . . dementia," his "memory [wa]s severely impaired," and he "lack[ed] intact memories of events and easily confuse[d] memories he does have or that others attempt to remind him about," court held that these conditions "do not establish that [he] does not understand the reasons for his conviction or the nature of his punishment."); *Simon v. Fisher*, 641 F. App'x 386, 389 (5th Cir. 2016) (agreed with Sixth Circuit); *State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 750 (Mo. 2015) (although inmate has "several disorders," including "dementia," "traumatic brain injury," "a small stroke," and "possible age-related decline," he has a rational understanding under *Ford/Panetti* because he "understands that he is under the threat of execution, that this will result in his death"); *State v.*

that has held dementia-induced memory problems to bar execution is the one this Court summarily reversed in the last iteration of this case. *See Dunn*, 138 S. Ct. at 12.

Ultimately, Madison's legal position extends the prohibition on executing the insane far beyond *Ford* and *Panetti*. Madison may not independently remember his crime. But he shares the community's understanding of crime and punishment, can appreciate the morality of murder, and knows he is being executed because he was convicted of that crime. He understands these concepts so well that he continues to deny responsibility for murdering Officer Schulte and to assert that his sentence is "unjust." Doc 8-3 at 18 (Goff expert report). Madison's dementia-induced amnesia is insufficient to establish incompetence to be executed.

B. Madison's arguments for reversal are unpersuasive.

Madison's brief does not explain how his inability to recall his crime makes his understanding of "crime and punishment" any different than the understanding "shared by the community as a whole." *Panetti*, 959. Instead, the brief makes two unpersuasive arguments that do not meaningfully grapple with the actual question presented.

First, Madison argues against a strawman, suggesting that the lower court denied his successive cut-and-paste petition because dementia is not a

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Irick, 320 S.W.3d 284, 295-96 (Tenn. 2010) (although inmate "has no memory of the events surrounding the murder," inmate was competent to be executed because he understood "that he has been convicted of murdering the victim" that that he was "scheduled to be executed for this crime").

mental disorder. In the fantasy world imagined by Madison's brief, the lower court "rejected Mr. Madison's claim for relief under *Ford* largely because dementia and neurological disease were seen as outside the scope of protection under the Eighth Amendment." Pet. Br. at 16. The lower court also supposedly denied Madison's claim because "vascular dementia constitutes a different medical condition than what this Court has recognized as triggering the Eighth Amendment protections of *Ford* and *Panetti*." Pet. Br. at 24.

But in the real world, the lower court found—and the State argued below—that Madison has a rational understanding of the death penalty *despite* his dementia and purported memory problems.[4] As we told the Court the last time we were here, the problem for Madison's legal position is that he can rationally understand why he is being punished, "not that [he] suffers from a delusion that is different than the one at issue in *Panetti* or that his 'DSM diagnosis differ[s]' from the diagnosis in *Ford*." State's Reply Br.,

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[4] In a footnote, Madison's brief asserts that "the State has consistently argued that Mr. Madison's claim should fail because vascular dementia, and associated cognitive and memory impairments, is not considered a mental illness." Pet. Br. 24 n. 16. This is incorrect. As a matter of *state* law, the State has argued that Madison's condition is not "insanity" under Ala. Code § 15-16-23, such that his petition should have been filed under Rule 32 of the Alabama Rules of Criminal Procedure. But, as a matter of federal law, the State has consistently argued that Madison does not meet the *Ford/Panetti* standard because his mental disorder does not prevent him from understanding why he is being punished. *See, e.g.*, State Br. in Opp'n 14 (noting that Madison's "own expert agreed that he understands he was tried for [murder], that he is in prison and will be executed because of that offense, and the finality of death if his sentence is carried out").

Madison v. Dunn, No. 17–193. at 7 (Sept. 14, 2017). In the words of the federal habeas court, the state court "found that any dementia, and the alleged deficits in memory associated with that condition, did not prevent Madison from having a rational understanding of his execution and the reasons for his execution." *Madison v. Dunn*, 2016 WL 2732193, at *9 (S.D. Ala. May 10, 2016). As we have explained above, *supra* pp. 18-22, the lower court's decision on this point faithfully applied this Court's precedents.

Second, Madison's brief simply begs the question by assuming without any argument that he meets the *Ford/Panetti* standard. This error starts at the very beginning of his brief. Madison's certiorari petition asked the Court to determine whether the State could execute a "prisoner whose mental disability leaves him without memory." Cert. Pet. at i. This is the question we have answered. But Madison's brief alters the question presented so that it also asks whether the State may execute a prisoner whose mental condition "leaves him without memory of the commission of the capital offense *and prevents him from having a rational understanding of the circumstances of his scheduled execution*." Pet. Br. at i (emphasis added). This formulation builds the assumption that Madison meets the *Ford/Panetti* standard (and thus cannot be executed) into the question presented, even though the Court granted certiorari to resolve the question whether his impairments meet that standard and even though the lower court held as a matter of fact that he did not.

Madison's question-begging argument assumes that the bare fact that he suffers from dementia necessarily establishes that he is incompetent to be executed. But this argument finds no support in *Ford*

or *Panetti*. In both cases, the Court made clear that an inmate could not establish incompetence merely by having a mental disorder. The central question in both cases was whether an inmate's diagnosed mental disorder actually eliminated his ability to understand his punishment.[5] Under *Ford* and *Panetti*, it is not enough for Madison to suffer from a diagnosed mental disorder. He must establish that his "mental illness obstructs a rational understanding of the State's reason for his execution." *Panetti*, 551 U.S. at 956.

The rational understanding step in the competency analysis is especially important with a diagnosis like dementia. The DSM-5 recognizes that cognitive disorders like dementia "exist on a spectrum of cognitive and functional impairment" that varies considerably from person to person. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 607 (5th Ed. 2013) [hereinafter "DSM-5"]. Because the key diagnostic criteria is "cognitive decline from a previous level of performance," a "high-functioning individual" may be properly diagnosed with dementia even if his abilities register as "'normal.'" DSM-5 at 602, 607. Moreover, a major neurocognitive disorder like dementia may be accompanied by a wide variety of symptoms. One person who suffers from dementia

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[5] The district court on remand in *Panetti* expressly found the inmate to be "mentally ill," but, like the state court in this case, still found that the innate had "a factual and rational understanding of his crime, his impending death, and the causal retributive connection between the two." *See Panetti v. Quarterman*, 2008 WL 2338498, at *37 (W.D. Tex. Mar. 26, 2008). The court of appeals affirmed, and this Court denied certiorari. *See Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013), *cert. denied*, 135 S. Ct. 47 (2014).

might merely "require[e] assistance with . . . paying bills." DSM-5 at 602. Another might have "delusions" and "paranoia." DSM-5 at 606. As the Court has observed, the medical definitions of mental disorders "are subject to flux and disagreement," and diagnoses "may mask vigorous debate within the profession about the very contours of the mental disease itself." *Clark v. Arizona*, 548 U.S. 735, 752, 772 (2006). "[T]he consequence of this professional ferment," the Court has noted, "is a general caution in treating psychological classifications as predicates for excusing otherwise criminal conduct." *Id.* at 775

Although it is possible that some other inmate with dementia could establish that his condition has eliminated his rational understanding of crime and punishment, Madison has not met that burden. Even though Madison was already asserting 28 years ago that he could not remember the murder, he now says a recently diagnosed disorder has caused him not to recall "the facts of the offense" or "the name of the victim." Pet. Br. at 10. But Madison's lack of independent recollection does not eliminate his ability to understand death, appreciate the gravity of murdering a police officer, or otherwise share the community's understanding of crime and punishment. Madison's own expert testified that he "is able to understand the nature of the pending proceeding," Doc. 8-3 at 19 (report), understands that "the reason he was in prison was because of 'murder,'" understands that the State is "seeking retribution" for that crime, Doc. 8-1 at 120 (hearing), and "understands the sentence . . . specifically the meaning of a death sentence," Doc. 8-3 at 18 (report). Madison's disorder does not make him any less deserving of punishment nor does it render his

punishment less of a deterrent to himself or to others.

II. The Eighth Amendment allows a State to punish a murderer whose mental disability leaves him without memory of his commission of the capital offense.

Just as Madison's claims are inconsistent with *Ford* and *Panetti*, no other part of this Court's Eighth Amendment doctrine supports his position.

In determining whether the Eighth Amendment bars a particular punishment as "cruel and unusual," the Court has followed a well-established analytical path. First, the Court examines whether the punishment was among "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1791. *Ford*, 477 U.S., at 405; *see also Solem v. Helm*, 463 U.S. 277, 285-86 (1983). Second, the Court considers whether the punishment is deemed cruel and unusual according to modern "standards of decency." *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality op.)). Those standards derive principally from "objective evidence of contemporary values," the "clearest and most reliable" of which is "the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citation and quotation marks omitted). Finally, the Court applies its "independent judgment" to evaluate "the acceptability of a particular punishment under the Eighth Amendment." *Roper*, 543 U.S., at 563-64. In capital cases, the Court has made this assessment primarily by reference to "the penological justifications for the

death penalty." *See id.*, at 571; *Atkins*, 536 U.S., at 317.

A. The common law supports the punishment of murderers who cannot remember committing a crime.

The constitutional prohibition on executing the insane comes from the common law. *See Ford*, 477 U.S. at 406-07 (citing Blackstone and Coker). But there is no similar common law prohibition on the punishment of someone who cannot recall committing a crime.

The historical sources uniformly attest that the common law prohibition on the execution of the insane came into play only if a prisoner suffered a comprehensive deprivation of his intellectual powers. Blackstone formulates the prohibition on the execution of the insane in terms of the concept of "nonsane memory." As he puts it, if a man "in his sound memory commits a capital offence" and later "becomes of nonsane memory, execution shall be stayed." 4 William Blackstone, *Commentaries*, *24-*25. But in the Law French of Blackstone's time, the expression "nonsane memory" did not denote amnesia. It was defined as a condition in which a party "was Mad or not within his wits." John Cowell, A Law Dictionary or The Interpreter of Words and Terms (1777)(definition of "non sane memory"). *See also* Alexander M. Burrill, A Law Dictionary and Glossary 192 (2d ed. 1859)(definition of "memory"). Indeed, Edward Coke's discussion of the same prohibition requires that the inmate be "totally deprived of all compassings, and imaginations." 3 Edward Coke, Institutes 6 (6th ed. 1680). Matthew Hale also stressed that the requisite mental condition "must be

an absolute madness." 1 Matthew Hale, Pleas of the Crown 37 (1736). And Blackstone's own discussion uses the term "nonsane memory" interchangeably with "madness." 4 Blackstone, *Commentaries*, *24-*25.

It is thus entirely unsurprising that common law courts confronted with the question whether this prohibition extends to amnesia have answered with a resounding "no." *Contra* APA Br. at 11. Parliament codified the common law prohibition in the Criminal Lunatics Act of 1800 shortly after our country ratified the Eighth Amendment. *See* Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield*, 19 Law & Society Rev. 487, 513-15 (1985). By the middle of the 20th century both English and Scottish courts had firmly concluded that "amnesia causing the disappearance of all memory of the events surrounding the alleged crime cannot of itself constitute insanity for the purposes of that Act." *R.* v. *Podola*, [1959] 43 Crim. App. 220, 238 (England) (recognizing that term "memory" as used in Blackstone "does not relate to recollection, but to a state of mind"). *See also Russell v. H.M. Advocate*, 1946 S.C.(J.) 37 (Scotland) (same).

Thus, the common law itself supplies no support for Madison's position. Nor do the rationales for the prohibition on the execution of the insane offered by common law authorities, and Madison makes little attempt to argue otherwise.

First, Justice Powell observed in *Ford* that some authorities contended that it is "against christian charity to send a great offender quick ... into another world, when he is not of a capacity to fit himself for it." 477 U.S. at 419-20 (Powell, J., concurring) (quoting Hawles, Remarks on the Trial of Mr. Charles

Bateman, 11 How. St. Tr. 474, 477 (1685)). Drawing on this rationale, Madison suggests that his execution would "implicate society's and the Eighth Amendment's aversion to grotesque and obscene punishment." Pet. Br. at 28. But there is no sense in which Madison's alleged memory loss could implicate the "natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity." *Ford*, 477 U.S. at 409. Madison's amnesia does not affect his capacity to know that he murdered Officer Schulte or to understand that murdering a police officer is morally wrong. This is enough for Madison to reckon with the gravity of his crime and seek reconciliation based on whatever religious or moral beliefs he may hold.

Second, *Ford* indicates that some common law authorities took the justification for the prohibition to be that a prisoner who has lost his sanity cannot adequately participate in his defense and thus may forfeit an opportunity to obtain a stay of execution that he otherwise might have realized. 477 U.S. at 406-407. But as Justice Powell's concurrence rightly noted, this "justification[] has slight merit today" because "[m]odern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review." *Id.* at 420 (Powell, J., concurring in part and concurring in the judgment). Factual issues are contested primarily at the trial court level where the defendant's opportunity to participate and advise defense counsel is protected by the requirement of trial competency. And appeals that occur late in the process leading to execution tend to address legal rather than factual issues, emphasizing the competency of appellate counsel rather than that of the condemned.

Third, *Ford* notes that another common law rationale for the prohibition on the execution of the insane was that "madness is its own punishment: *furiosus solo furore punitur*." 477 U.S. at 407-08. *But see* Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 La. L. Rev. 995, 1002 (1991) ("[M]adness cannot constitute punishment comparable to execution simply because it is not punishment at all."). Madison makes no attempt to rely on this rationale, and with good reason, because it is difficult to see how this rationale makes any sense as applied to Madison's condition. Dementia is a common disorder that afflicts roughly 3.9 million Americans, including roughly 7% of all Americans over 60 years old. *See* Martin Prince, Tenata Bryce, et al, *The Global Prevalence of Dementia: A Systematic Review and Metaanalysis*, 9 Alzheimer's & Dementia 63, 69 (2013). Madison's dementia-based amnesia is not equivalent to state-imposed punishment for murder.

Fourth, *Ford* mentions one other traditional justification for the prohibition: that the execution of a prisoner who has lost his mind is simply "savage and inhuman." 477 U.S. at 406 (quoting Blackstone); *see also* 3 Edward Coke, Institutes 6 (6th ed. 1680). This "intuition that such an execution simply offends humanity" may supply a satisfactory explanation of the common law rule, but it does nothing to support the extension of that doctrine to cases of amnesia. *Ford*, 477 U.S. at 409. As *Ford* itself suggests, this intuition's legal significance derives from the fact that it "is evidently shared across this Nation." *Id.* at 409. Nothing similar can be said about the execution of prisoners who cannot recall the facts of their crime. *See infra* pp. 32-34 (discussing present standards of

decency). Moreover, the factual predicate undergirding this intuition is absent in cases like Madison's. The traditional common law prohibition "protect[s] the condemned from fear and pain without comfort of understanding" and thus avoids the brutal spectacle of the execution of a person with no comprehension of his predicament. *Ford*, 477 U.S. at 410. But Madison's condition does not deprive him of the relevant mode of understanding, and thus presents no such risk.

B. Madison's position finds no support in state legislation or sentencing practice.

The Court's Eighth Amendment analysis also relies on "objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S at 173. Indeed, Eighth Amendment cases "should be informed by objective factors *to the maximum possible extent*." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (emphasis added). *See also Ford*, 477 U.S. at 406 (pointing to the "objective evidence of contemporary values" as the touchstone of any "standards of decency" analysis).

There is not a shred of legislative evidence that Madison's execution would flout contemporary "standards of decency." In the death penalty context, the "clearest and most reliable objective evidence of contemporary values" are the laws passed by the people's elected representatives. *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). But not one State has proscribed the use of capital punishment against prisoners with dementia-induced memory loss. This legislative silence is all the more striking given the recent, highly-publicized claims of death-row inmates with medical conditions

like Madison's in Ohio,[6] Missouri,[7] and Mississippi.[8] Were the public widely opposed to execution in such cases, one would expect a swift legislative response—a groundswell like the ones that preceded *Atkins* and *Roper*. *See Atkins*, 536 U.S. at 313-18; *Roper*, 543 U.S. at 564-67. But no such response has materialized.

For their part, the relevant professional associations have adopted standards that focus on psychosis, not memory. The American Bar Association does not address "memory" in its standard for competence to be executed. That standard instead provides that a "convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceeding, what he or she was tried for, the reason for the punishment or the nature of the punishment." Am. Bar Assoc. Crim. Just. Mental Health Stds., Std. 7-5.6(b).[9] Like the ABA, the American Psychiatric Association and the American Psychological Association are concerned about inmates with "profound de-

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[6] *Ohio Man Executed for Double Murder He Doesn't Remember*, Daily Mail (May 17, 2011) http://www.dailymail.co.uk/news/article-1388091/Ohio-man-Daniel-Lee-Bedford-executed-double-murder-doesnt-remember.html (last visited June 29, 2018).

[7] *Missouri Executes Cecil Clayton, Killer who had Brain Injury*, LA Times (March 17, 2015) http://www.latimes.com/nation/nationnow/la-na-nn-missouri-execution-cecil-clayton20150317-story.html (last visited June 29, 2018).

[8] *Is Mississippi Death Row Inmate Robert Simon Faking Amnesia?*, AL.com (The Associated Press) (June 10, 2015); https://www.al.com/news/index.ssf/2015/06/is_mississippi_death_row_inmat.html (last visited June 29, 2018).

[9] http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (last visited July 26, 2018).

ficiencies in understanding" that are "associated with mental retardation and with delusional beliefs." *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 676 (2006). These organizations believe an inmate is competent to be executed if he has "a meaningful understanding that the state is taking his life in order to hold him accountable for taking the life of one or more people." *Id.*

We recognize that twelve years ago these organizations adopted a policy resolution that *any* significant mental disorder should bar the imposition of the death penalty. *See id.*; Pet. Br. at 27 n.17. That extreme position explains the amicus brief two of these organizations filed here. *See* APA Br. at 2. But no state legislature has adopted this position. Nor has it persuaded any lower court.[10] Because there is no basis in the evolving standards of decency to hold that any mental illness precludes execution, neither Madison nor his amici expressly argue for such a rule.

C. The State has valid penological interests in punishing a murderer who cannot remember committing a crime.

Finally, a prisoner's ability to recall his crime is irrelevant to whether his execution would advance the penological interests the Court has singled out as

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[10] *See In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006); ; *Baird v. Davis*, 388 F.3d 1110, 1114–15 (7th Cir. 2004); *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010); *Mays v. State*, 318 S.W.3d 368, 379–80 (Tex. Crim. App. 2010); *Johnston v. State*, 27 So.3d 11, 26–27 (Fla. 2010); *Hall v. Brannan*, 670 S.E.2d 87, 96–97 (Ga. 2008); *State v. Ketterer*, 855 N.E.2d 48, 77 (Ohio 2006); *State v. Johnson*, 207 S.W.3d 24, 50–51 (Mo. 2006); *Matheney v. State*, 833 N.E.2d 454, 458 (Ind. 2005); *Malone v. State*, 293 P.3d 198, 216 (Okla. Crim. App. 2013).

"the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008). The retributive value of punishment depends on an offender's culpability *at the time of the offense*, not at the time when his sentence will be executed. There is likewise no reason to believe that Madison's execution will not have the same deterrent effect as any other execution.

1. Retribution. From a retributive perspective, amnesia developed after the commission of a capital offense has no bearing on whether the offender deserves to be executed for his crime. Retributive justice requires the punishment of offenders because they have engaged in culpable wrongdoing and thus deserve to be punished. *See Atkins*, 536 U.S. at 319; *Tison v. Arizona*, 481 U.S. 137, 149 (1987); Michael S. Moore, *Justifying Retributivism*, 27 Isr. L. Rev. 15, 30 (1993). The object of retributive justice is the cancellation of a wrong committed against an individual and the State through the elimination "of the moral imbalance caused by the offense." *Graham v. Florida*, 560 U.S. 48, 71 (2010). This imbalance arises when an offender engages in culpable wrongdoing and cannot be corrected until he receives the punishment he deserves.

Put otherwise, retributive justice is backward-looking and concerned only with the offender's culpability at the time when he committed the offense in question. *See* Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 Cornell L. Rev. 989, 1029 (1996). "From a retributive perspective, the punishment a defendant deserves is . . . fully congealed at the time of the crime. The future is neither here nor there. Only the past mat-

ters." *Id.* at 1029-1030. Only the offender's state of mind at the time when he committed the offense in question is relevant to retribution.

To be sure, *Panetti* suggests that retribution has a communicative function that is compromised when a prisoner's "mental illness obstructs a rational understanding of the State's reason for his execution," even if he were fully culpable for his offense. 551 U.S. at 956. As this Court put the point, "it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Id.* at 958. When "the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole," however, "[t]he potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question." *Id.* at 958-59.

But these concerns are not implicated here. A prisoner's failure to independently recall committing a crime does not prevent him from possessing an understanding of his crime and sentence that corresponds to the conception of the community as a whole. The facts of this case provide an apt illustration. Apart from the three eye witnesses who saw Madison murder Officer Schulte, no member of the community's grasp of the gravity of Madison's crime and the justification for his sentence will derive from introspectively-accessible memories of the murder.

Instead, their understanding will be based on the evidence adduced at Madison's murder trials—the same evidence that led three juries to convict him of capital murder. That Madison allegedly cannot recall murdering Officer Schulte in no way undercuts his capacity to form the same understanding of his crime and sentence based on the same evidence.

For analogous reasons, the fact that Madison's vascular dementia allegedly prevents him from remembering that he murdered Officer Schulte does nothing to obstruct his potential "recognition of the severity of the offense." *Id.* at 958. Nothing in the record so much as suggests that Madison has lost the capacity to recognize that murdering a police officer is a grave legal and moral offense. *See Roberts*, 431 U.S. at 649 (Rehnquist, J., dissenting) ("the premeditated murder of a peace officer is so heinous and intolerable a crime that no combination of mitigating factors can overcome"). And any reasonably mature human being can feel guilt and remorse for a wrong they have committed against another person even if they cannot personally recall committing the act in question. Thus, to the extent the political community's decision to impose a capital sentence communicates "its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed," Madison can receive and understand this message. *Panetti*, 551 U.S. at 958.

Finally, Madison's argument finds no purchase in precedents that "ban[] the execution of prisoners whose diminished culpability, by virtue of age or intellectual disability, rendered the death penalty excessive and cruel." Pet. Br. at 18. Unlike the young or the intellectually disabled, Madison does not have "lesser culpability" for his crimes. *Atkins*, 536 U.S. at

319.[11] Madison was a violent felon on parole when he murdered Officer Schulte and tried to murder his estranged girlfriend. He is fully culpable for his actions.

2. Deterrence. Deterrence also justifies the execution of a capital sentence even where the prisoner has purportedly forgotten committing his crime. "The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Atkins*, 536 U.S. at 320. The general deterrent effect of capital punishment is diminished for offenders who suffer from "the same cognitive and behavioral impairments that make . . . defendants less morally culpable." *Id.* Impairments of this kind "also make it less likely that they can process the information of the possibility of execution as a penalty, and as a result, control their conduct based upon that information." *Id.*

But this logic applies only to cognitive impairments that have taken hold before an offender has committed a capital crime. Just as the subsequent development of a memory impairment has no impact on an offender's moral culpability at the time when he committed his offense, it can have no effect on an offender's ability to incorporate the expected cost of a capital sentence into the "cold

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[11] Madison argues that "age of onset is the only difference between an individual who is intellectually disabled . . . and an individual who suffers from dementia." Pet. Br. 28 at 17. Though Mr. Madison's cognitive faculties have slipped in the wake of his recent strokes, he has an IQ of 72—above the cognitive threshold required to stand trial, to be held criminally responsible for one's actions, or to be eligible for execution under *Atkins*. *See* Pet. Br. at 26.

calculus that precedes the decision" to commit a capital crime. *Gregg v. Georgia*, 428 U.S. 153, 186 (1976). Unlike the intellectually disabled or juveniles, offenders like Madison do not form a class of persons who are "less likely to consider potential punishment" when deciding whether to commit a capital offense. *Miller v. Alabama*, 567 U.S. 460, 472 (2012).

If anything, extending the doctrine of *Ford* and *Panetti* to Madison's amnesia claim would diminish the general deterrent value of capital punishment by interposing between conviction and execution a requirement that a prisoner independently remember committing their crime. This would make it less likely that any given offender will be executed for his crime, since there is a nontrivial chance that anyone can develop a memory-impairing health condition. Madison's proposed rule would also effectively condition the execution of a death sentence on the offender's assent to the proposition that he remembers committing his crime. This development would undermine the threat of punishment upon which general deterrence depends.

Madison's attempts to demonstrate that his condition would compromise the deterrent value of his sentence come up short.

First, he argues that because the *Ford* plurality suggested that the execution of an incompetent person "provides no example to others and thus contributes nothing to whatever deterrence value is intended by capital punishment," 477 U.S. at 407, his execution would not serve the ends of deterrence. Pet. Br. at 28. But this argument begs the question by assuming—with no further argument—that Madison's condition renders him incompetent to be executed. As argued above, *supra* pp. 18-27,

Madison's amnesia in no way prevents him from forming the requisite "rational understanding of the reasons for the execution." *Panetti*, 551 U.S. at 958. Thus, *Ford* supplies no cause for skepticism about whether Madison's execution would provide an example to others. And common sense suggests that it will. His execution will send a message that murdering a police officer is a crime grave enough to warrant "the law's most severe penalty." *Roper*, 543 U.S. at 571. *See also Roberts*, 431 U.S. at 636 & n.3.

Second, Madison asserts—with no apparent justification—that "with incapacity by virtue of dementia, specific deterrence is already achieved." Pet. Br. at 28. But this assertion is contradicted by a wealth of evidence suggesting that, in all but the most severe cases, persons who suffer from dementia can respond rationally to incentives.[12] While it is true that a mentally ill prisoner who has no awareness that he will be executed if he commits a capital offense is not specifically deterrable, this logic plainly does not extend to those who, like Madison, do not suffer from that impairment.

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[12] *See, e.g.*, Soumya Hegde & Ratnavalli Ellajosyula, *Capacity Issues and Decision-Making in Dementia*, 19 Ann. Indian Acad. Neurol. 34 (2016) (summarizing research on reasoning and capacity in dementia patients); J. Karlawish, *Measuring Decision-Making Capacity in Cognitively Impaired Individuals*, 16 Neurosignals 91 (2008) (decisional impairment is on a spectrum in dementia patients); Scott Y.H. Kim, Jason H.T. Karlawish, & Eric D. Caine, *Current State of Research on Decision-Making Competence of Cognitively Impaired Elderly Persons*, 10 Am. J. Geriatric Psychiatry 151 (2002) (noting that many dementia patients do not suffer from decisional impairment).

III. Madison's proposed extension of *Ford* and *Panetti* will lead to false claims, manipulation, and abuse.

Madison's proposal to extend *Ford* and *Panetti* will heighten the already existing problem of false claims, manipulation, and abuse in this area. Justice O'Connor warned in *Ford* that "the potential for false claims and deliberate delay in this context is obviously enormous." 477 U.S. at 429 (O'Connor, J., concurring in part and dissenting in part). Because every death row inmate has an incentive to delay his execution, she predicted that an inmate will continue to "claim that he has become insane" no matter "the number of prior adjudications of the issue, until the very moment of execution." *Id.* Madison's position, if accepted, would only make these problems worse.

First, Madison's position would give talismanic importance to an inmate's mental disorder diagnosis, even though precise mental health diagnoses are shifting, debatable, and subjective. "[P]sychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). For that reason, "a particularly acute need for guarding against error inheres in a determination that 'in the present state of the mental sciences is at best a hazardous guess however conscientious.'" *Ford*, 477 U.S. at 412 (quoting *Solesbee v. Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)). As Justice Powell explained,

> Unlike issues of historical fact, the question of petitioner's sanity calls for a basically subjective judgment. And unlike a determination of

> whether the death penalty is appropriate in a particular case, the competency determination depends substantially on expert analysis in a discipline fraught with 'subtleties and nuances.'

Ford, 477 U.S. at 425 at 426 (Powell, J., concurring in the judgment) (quoting *Addington v. Texas*, 441 U.S. 418, 430 (1979)) (citations omitted).

The diagnosis of cognitive disorders, in particular, is not nearly as straightforward as Madison claims. The DSM-5 classifies vascular dementia as a "major neurocognitive disorder" characterized by progressive memory loss, general cognitive decline, and diminished executive functioning. DSM-5 at 621. While earlier editions of the DSM relied exclusively on clinical observation to establish these four factors, the DSM-5 incorporates neurological imaging—primarily MRIs and CT scans—as a way to confirm a patient's cognitive decline. Specifically, it directs physicians to find abnormalities in these brain scans, and to correlate them to clinically-observable cognitive deficiencies. *See id.* at 622 ("Etiological certainty requires the demonstration of abnormalities on neuroimaging."). But, despite these changes in the DSM-5, dementia remains a necessarily vague diagnosis. The DSM-5 recognizes that the "distinction between major and mild" neurocognitive disorders "is inherently arbitrary" without any "[p]recise thresholds." *Id.* at 608. Stripped to its essentials, dementia refers to abnormal cognitive decline, corroborated by brain imaging, for which no superior explanation is available. "Vascular dementia is s syndrome, not a disease." Kenneth Rockwood et al., *Diagnosis of Vascular Dementia*, 21 Can. J. Neurol. Sci. 358, 361 (1994). .*See*

also APA Br. at 8. The use of brain imaging does not render a dementia diagnosis any less subjective.

Second, under Madison's rule, many more prisoners will be able to claim that their mental disorders prohibit their execution. Because few people who commit capital murder are "normal" or "rational" in the conventional sense, the Court has rightly imposed a high bar for an inmate to "show[] that his current mental state would bar his execution." *Panetti*, 551 U.S. at 934, 959. Lowering that bar as Madison suggests would leave a blurry line between the small class of capital murderers who are "insane" and the very many who are "unrepentant" and "lack all sense of guilt." *Id.* at 960.

There are also many neurological conditions that could deprive a capital murderer of an independent memory of committing his crime. The range of prisoners eligible to assert such claims would not be confined to those suffering from stroke-induced dementia like Madison. Recognized medical conditions that can result in the loss of autobiographical memory include traumatic brain injuries,[13] Alzheimer's disease,[14] Parkinson's

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[13] Pascale Piolino, Béatrice Desgranges, Liliane Manning, Pierre North, Corinne Jokic, & Francis Eustache, *Autobiographical Memory, the Sense of Recollection and Executive Functions After Severe Traumatic Brain Injury*, 43 Medical Image Analysis 172 (2007) (traumatic brain injury patients, compared with healthy controls, were significantly impaired in recalling episodic autobiographical memories).

[14] Mohamad El Haj et al., *Autobiographical Memory Decline in Alzheimer's Disease*, 27 Ageing Res. Rev. 15 (2016) (autobiographical recall in Alzheimer's disease is characterized by loss of episodic information).

disease,[15] and Wernicke-Korsakoff syndrome.[16] Apart from these disorders, the generic effects of aging, stress, and depression can also induce episodic memory loss.[17] There is even evidence suggesting that otherwise healthy, high-functioning individuals can suffer from severe autobiographical memory deficiencies even when they do not suffer from any medical disorder recognized under existing diagnostic criteria.[18]

These concerns are not speculative or marginal. Over the past few decades, as this Court has expanded the range of state and federal appeals

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[15] Sarah J. Smith, Celine Souchay, Martin A. Conway, *Overgeneral Autobiographical Memory in Parkinson's Disease*, 46 Cortex 787 (2010).

[16] Michael D. Kopelman, *What Does A Comparison of The Alcoholic Korsakoff Syndrome And Thalamic Infarction Tell Us About Thalamic Amnesia?*, 54 Neuroscience & Behavioral Rev. 46 (2015).

[17] *See, e.g.*, Brian Levine, Eva Svoboda, Jannine F. Hay, Gordon Winocur, & Morris Moscovitch, *Aging and Autobiographical Memory: Dissociating Episodic from Semantic Retrieval*, 17 Psychology and Aging 677 (2002) (older adults manifested diminished personal remote memory); Mark A. Smith, *Hippocampal Vulnerability to Stress and Aging: Possible Role of Neurotrophic Factors*, 78 Behavioral Brain Research 25 (1996) (anxiety and stress can result in hippocampal damage and loss of memory); B.M. Elzinga & J.D. Bremner, *Are the Neural Substrates of Memory the Final Common Pathway in Posttraumatic Stress Disorder?*, 70 J. Affective Disorders 1 (2002) (by influencing the hippocampus, amygdala, and prefrontal cortex, posttraumatic stress disorder can result in autobiographical memory disturbances); Cristiano A. Köhler et al., *Autobiographical Memory Disturbances in Depression*, 2015 Neural Plast. 759139 (2015) (major depressive disorder is characterized by dysfunctional processing of autobiographical memory).

[18] Daniela J. Palombo, Claude Alain, Hedvig Söderlund, Wayne Khuu, & Brian Levine, *Severely Deficient Autobiographical Memory (SDAM) in Healthy Adults: A New Mnemonic Syndrome*, 72 Neuropsychologia 105 (2015).

afforded to prisoners facing capital punishment, the average age of death row inmates has been steadily rising. At the same time, dementia is expected to become increasingly common in advanced societies: by 2030, demographers predict, 11.25% of North Americans over 60 will have dementia. This figure is expected to reach 17.32% by 2050. *See* Martin Prince, Tenata Bryce, et al, *The Global Prevalence of Dementia: A Systematic Review and Metaanalysis*, 9 Alzheimer's & Dementia 63, 70 tbl.4 (2013). Given these two trends, we can expect to see a sharp increase in the number of death row inmates invoking real or feigned age-related health problems to evade execution.

Third, a rule prohibiting the execution of those who cannot remember committing their crime would create new opportunities for malingering and evasion. "False pleas of amnesia by criminal defendants are both common and difficult to detect." *Price v. Thurmer*, 637 F.3d 831, 834 (7th Cir. 2011) (citing Marko Jelicic, Harald Merckelbach & Saskia van Bergen, *Symptom Validity Testing of Feigned Amnesia for a Mock Crime*, 19 Archives of Clinical Neuropsychology 525 (2004)). Although there are tests for detecting false claims of amnesia, "'there is still ... no "gold standard" measure for distinguishing between cases of genuine and feigned amnesia.'" *Id.* (quoting Xue Sun et al., *Does Feigning Amnesia Impair Subsequent Recall?*, 37 Memory & Cognition 81 (2009)).

Although Madison points to the possibility of neuroimaging to verify false claims of amnesia, neuroimaging cannot establish the precise extent of a patient's cognitive decline or memory loss. Technological advances in brain imaging have made detection of the physiological correlates of dementia-

induced memory loss easier to recognize by objective means. But verifying that a prisoner's condition has resulted in the loss of the specific memories associated with the commission of a capital offense will ultimately turn on the prisoner's say-so. The existing scientific consensus is that functional magnetic resonance imaging "research, processes, and technology are insufficiently developed and understood for gatekeepers to even consider introducing these neuroimaging measures into criminal courts as they stand today for the purpose of determining the veracity of statements made." Elena Rusconi & Timothy Mitchener-Nissen, *Prospects of Functional Magnetic Resonance Imaging as Lie Detector*, 7 Frontiers in Human Neuroscience, Art. 594 at 1 (2013). Ultimately, the only person who can know with any certainty whether a person remembers a particular event is the person himself.

CONCLUSION

The Court should hold the line it established in *Ford*, *Panetti*, and its 2017 decision in this case. Sanity and recollection are two distinct concepts. Although the Constitution bars the execution of an inmate who has lost his sanity, it does not bar the execution of an inmate who has lost his memory. The Court should affirm.

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